Supreme Court, U.S.
FILED
APR 6 1992
OFFICE OF THE CLERK

No. 91-6194

In The

Supreme Court of the United States

October Term, 1991

MICHAEL CROSBY,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

MARK D. NYVOLD*
(Appointed by this Court)
Suite 654, Capital Centre
386 North Wabasha Street
Saint Paul, Minnesota 55102
Telephone: (612) 223-5175
Counsel for Petitioner

KENNETH W. STARR*
Solicitor General
Department of Justice
Washington, D.C. 20530
Telephone (202) 514-2217
Counsel for Respondent

*Counsel of Record

Petition For Certiorari Filed October 21, 1991
Certiorari Granted March 2, 1992

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Relevant Docket Entries..... 1

Transcript of Trial Proceedings on October 12 and 13, 1988..... 7

Order of the District Court, filed October 14, 1988, Permitting Trial *In Absentia*..... 48

Opinion of the Eighth Circuit Court of Appeals, filed October 16, 1990..... 52

Amended Order of the Eighth Circuit Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing En Banc, filed May 8, 1991..... 70

Judgment *Nunc Pro Tunc* of the Eighth Circuit Court of Appeals, filed September 30, 1991..... 71

Order of the Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis, March 2, 1992..... 72

RELEVANT DOCKET ENTRIES

(United States District Court, District of Minnesota)

04-20-88	INDICTMENT
06/15/88	MINUTES (JEC) INITIAL APPEAR: Deft detained. PD appt'd. Arraign set for 6-23-88 @ 2 p.m. b/4 JEC. Det hrg 6-17-88 @ 11 a.m.
	ORDER OF TEMPORARY DETENTION
06/23/88	MINUTES (JEC/tape) Detention Hrg.
06/23/88	MINUTES (JEC/tape) ARRAIGN: Plea of not guilty entered to indict.
	DEFT'S PRETRIAL MOTIONS TO/FOR:
06/29/88	Severance
06/30/88	ORDER SETTING CONDITIONS OF RELEASE
07/05/88	APPEARANCE BOND exec @ $100,000.00 surety
07/28/88	Pretrial Conference Notice – set 8/15/88 at 9:00 a.m. before DDA.
8/10/88	REPORT AND RECOMMENDATION AND ORDER
	Defendants' motions for severance of counts and defendants are DENIED;
08/15/88	MINUTES (DDA/LL) Pretrial conf: trial set 10/12/88. Witnesses are ordered sequestered. All parties to exchange exhibit lists by 9/12/88. All parties to meet re: lists 9/29/88. PTC 9/30/88. Deft Cunningham's motion for extra juror strikes – Granted.
09/12/88	Notice of Trial – October 12, 1988 @ 9:30 a.m. b/4 DDA.

09/16/88 Notice of Ex Parte motion & Ex Parte motion to withdraw.

09/19/88 ORDER (DDA) the magistrate's order of 9/10/88, is AFFIRMED. The magistrate's R & R of 8/10/88, is adopted & the motions of defts Kesler, Cheatham & Crosby to suppress are DENIED.

09/19/88 MINUTES (JMS/Beth Bettiga) Hrg on counsel's motion to withdraw. Matter submitted and motion to withdraw is denied. Transcript of these proceedings to be sealed.

09/23/88 ORDER (JMS) that the motion for withdrawl as counsel is DENIED.

09/30/88 MINUTES (DDA/LL) All gov't motions for exemplar have been granted & resolved. Order for excludable delay is granted in Mag. order of 8/10/88 (item 13) Proposed voir dire to be submitted by 10/7/88. counsel to meet on 10/4/88 @ 1 a.m. to go thru exhibit list. Court orders defense counsel to produce & furnish to gov't exhibit list by 10/6/88 & furnish copy of same to court. Doug Altman has no objection to the 10/12/88 trial date.

10/06/88 Deft's notice of motion & motion to renew motion to withdraw.

10/07/88 MINUTES (DDA/LL) Mr. Altman's requested transcripts & exhibits of this hrg sealed. GRANTED. Mr. Altman's renewed motion to withdraw as counsel is DENIED. Deft's oral request to be allowed to travel to Calif., withdrawn.

Exhibit from renewed motion of Michael Altman to withdraw as counsel on case. SEALED BY ORDER OF THE COURT

10/12/88 MINUTES (DDA/LL) No appear by deft. Prelim matters b/4 jury selection: 1) Deft Cunningham's motion to sever DENIED. 2) Deft Cunningham's renewed motions for discovery, Jencks material, exculpatory stmts – Court orders co-defts to provide material they rec'd to be examined by deft Cunningham. Court ordres [sic] Brady material on remaining defts to be furnished to counsel. Crosby's motion in Limine will not be heard until deft is present. Gov't moves for a bench warrant for deft's arrest & a 1 day continuance of trial – granted. Court orders a declaration of forfeiture hrg for 10/13/88 @ 8:30 a.m. Warrant issued.

Affidavit of Michael J. Crosby

ORDER (DDA) that a warrant be issued for the arrest of deft Crosby & that the USM undertake immediately to serve the warrant.

10/13/88 MINUTES (DDA/LL) No appear by deft Crosby. Forfeiture of bond hrg. Also attending: Mike Leverson-USM, & Mark Pagoli, Neil & Joseph Krzyzaniak, Allan (Bud) Goldberg, Bill Johnson & Glen Baskfield. Court orders Crosby's bond forfeited & to be pd by noon on 10/17/88.

DECLARATION OF FORFEITURE (DDA) that bond is ordered forfeited to the USA & the surety on the bond, Int'l Fidelity Ins Co, is ordered to pay the principal amt of the bond, to-wit $100,000.00 to the Clerk of this court on or b/4 12:00 noon on 10/17/88.

10/14/88 ORDER (DDA) that this action shall continue to trial on 10/17/88 in the absence of deft Crosby. (copies given to counsel in court)

10/17/88 Receipt #72402 in the amt of $100,000.00 for Bond Foreiture [sic] per Order dated 10/13/88, docket #51. Original copy of receipt sent to Bud Goldberg.

10/14/88 MINUTES (DDA/LL) PTC; Deft's motions for severence – DENIED; Court orders trail [sic] against Crosby to proceed in absentia. Deft Crosby's motion in Limine – taken under advisement except as to # 7 – which is denied.

10/17/88 MINUTES (DDA.LL) *1st day of trial:* Jurors impaneled.

10/28/88 TRANSCRIPT of hrg b/4 DDA on 10/7/88. This transcript contains statements of deft made to the Court during this [sic] proceedings.

11/18/88 MINUTES (DDA/LL) *Cont'd deliberations:* Jury returns w/verdict of guilty on cts 1 thru 25. Jurors excused. Exhibits retained by court. PSI ordered.

11/18/88 VERDICT

03/08/89 TRANSCRIPT of Trial commencing on 10/12/88. Vol I. [SEPARATE]

TRANSCRIPT of trial proceedings on 10/13/88. Vol II. [SEPARATE]

07/13/89 Defense counsels motion to withdraw.

07/14/89 Michael J. Crosby, consent to the withdrawl [sic] of Douglas B. Altman, Atty.

07/20/89 Affidavit of Douglas B. Altman

07/27/89 MINUTES (DDA/LL) Mr. Altman's motion to withdraw as counsel granted. Mr. Altman is withdrawn as active counsel but kept in as consulting atty. Mark Nyvold is appt'd as counsel. Sentencing cont'd for approx. 2 wks. Motion for remission of bond money – denied.

08/04/89 TRANSCRIPT of motion hrg b/4 DDA on 10/07/88. *FILED UNDER SEAL – SEE DOCKET ENTRY # 40*

08/21/89 MINUTES (DDA/LL) *SENTENCING*: 20 yrs + 5 yrs probation. Condition of probation, deft pay restitution in the amt of $550,000.00, partial list of victims attached. Special assmt of $1,250.00. Deft advised of his right to appeal his conviction.

08/28/89 NOTICE OF APPEAL by deft from Judgment entered on 08/21/89.

Cert/copies to U.S.C.A., St. Paul on 08/29/89.

01/16/90 ORDER FROM THE U.S.C.A. THAT THE GOVT'S MOTION FOR UNSEALING OF CERTAIN RECORD MATERIALS IS GRANTED. *THE DIST CT IS HEREBY ORDERED TO UNSEAL ALL RECORD MATERIALS, INCLUDING TRANSCRITPS* [sic] *& EXHIBITS PREVIOUSLY ORDERED SEALED IN THIS CASE.*

10/18/90 CERT/COPY OF OPINION OF THE U.S.C.A. (Gibson, Bright, & Fagg) REMANDING THE CASE TO DIST CT FOR FURTHER CONSIDERATION OF ITS RESTITUTION ORDER. THIS PANEL WILL RETAIN JURISDICTION OF THIS APPEAL. IF EITHER PARTY IS AGGRIEVED AFTER THE ENTRY OF THE

DIST CT'S ORDER RECONSIDERING THE RESTITUTION AWARD, WE WILL GIVE FURTHER CONSIDERATION OT [sic] THIS ISSUED ON A [sic] EXPEDITED BASIS.

12/26/90 Joint motion for amendment of sentence.

12/28/90 *AMENDED JUDGMENT & COMMITMENT ORDER* – copies dist'd Restitution reduced: $550,000.00 to $240,035.00

ORDER (DDA) pursuant to the mandate of 10/18/90, this action is resubmitted to the Court of Appeals of the 8th Circuit.

MANDATE: 89-5450

10/04/91 CERT/COPY OF OPINION OF THE USCA (Gibson, Bright & Fagg) AFFIRMING THE CONVICTION & REMANDING THE CASE TO THE DIST COURT FOR FURTHER CONSIDERATION OF ITS RESTITUTION ORDER IN LIGHT OF *HUGHEY*. 15 pgs

CERT/COPY OF JUDGMENT OF THE USCA (9/30/91) JUDGMENT OF THE DIST COURT IS AFFIRMED. THIS JUDGMENT IS ENTERED NUNC PRO TUNC TO 01/24/91, THE DATE THE APPELLANT NOTIFIED THIS COURT OF HIS AGREEMENT WITH THE DIST COURT'S AMENDED JUDGMENT & COMMITMENT ORDER (see doc #136) ENTERED AFTER HIS COURT'S OPINION OF LIMITED REMAND. THE RECORD IS HEREBY CORRECTED TO SHOW ENTRY OF JUDGMENT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

----------x

UNITED STATES OF AMERICA,

Plaintiff,

VS CR 3-88-40

MICHAEL CROSBY,
JAMES A. SANNES,
MARTIN CHEATHAM,
JACK CUNNINGHAM,

(October 12, 1988)

Defendants.

----------x

[2] WHEREUPON, the following proceedings were had:

* * *

Okay, we have the case of United States versus Michael Crosby. Mr. Crosby isn't here but we can discuss matters of law with reference to voir dire and that sort of thing before he comes.

* * *

[3] THE COURT: All right. Michael Crosby represented by Douglas Altman. Mr. Altman is here, Mr. Crosby is not. What did we tell him, 9:30, is that the problem.

MR. ALTMAN: It is possible Your Honor. I talked to my client yesterday and he indicated he would be here.

THE COURT: Why my guess is we have a problem with the timing of our start.

* * *

[25] THE COURT: What can you tell us about the whereabouts of Mr. Crosby, Mr. Altman, if anything.

MR. ALTMAN: Following the hearing on Friday I received the Jencks Act material late in the afternoon Friday, arranged to make a full set of copies for Mr. Crosby. I received those Saturday afternoon and called him at about 3:30 in the afternoon advising him that I had them and that they were available to him. I got his answering machine and I didn't hear anything from him the remainder of Saturday or Sunday.

I called him yesterday morning and asked him whether he went to California and he told me he had not. I told him again of the Jencks Act material, he advised me he would be coming over in the afternoon to pick it up and there were some other [26] matters discussed in connection with my representation which I don't think I have to go into.

THE COURT: No, you don't.

MR. ALTMAN: But he gave me every indication that he was not discharging me, that I was to represent him, and he would be here this morning. I didn't talk to him again the rest of the afternoon, nor to my knowledge did he ever come to my office.

THE COURT: But he indicated he would be here?

MR. ALTMAN: Yes, sir. I can try to call him now.

THE COURT: Why don't we take a break and why don't you do that. Our jury is here, Ms. Frette?

THE CLERK: Yes.

THE COURT: How many jurors do we have.

THE CLERK: I have no idea.

THE COURT: Check and see during the break.

All of your written motions, have they all been filed – do you have the originals.

THE CLERK: I have the originals.

THE COURT: Okay. I think that is all. We obviously can't start without Mr. Crosby. We will take a 20 minute break.

* * *

[28] We are ready to go except for Mr. Crosby is that it?

MR. ALTMAN: Yes, Your Honor.

THE COURT: We will recess for 10 minutes. You might check around the hall and see if you can locate him and make [29] your phone call and if he is not here why we will issue a bench warrant and see if we can locate him.

We will recess subject to call.

RECESS TAKEN

THE COURT: Okay. Well it is 10:25 or thereabouts Mr. Altman. You have been unable to make telephone contacts with your client, is that it.

MR. ALTMAN: That is correct, Your Honor.

THE COURT: Any of you other folks know the whereabouts of Mr. Michael Crosby.

(No response).

THE COURT: All right what do you suggest Ms. Erickson.

MS. ERICKSON: I would move for the issuance of a bench warrant at this time.

THE COURT: I was going to do it on my own motion but if you want to make the motion –

MS. ERICKSON: And I don't no personally of anybody that has seen him, but I understand that some of the defendants may have seen him within the last 24 hours and so I would move for a continuance of one day to see whether we can locate the body of Mr. Crosby and bring him in here so he can stand trial with the rest of co-defendants and not impose a de facto severance on the court when the court has already denied the severance motion.

THE COURT: I have checked with the pretrial services [30] office during our break and maybe he has got some traffic problem or he is unable to get here for some good and sufficient reason. We just don't know. But Mr. Marshal have you got a pad and we will – I am going to give you some information about him.

As I understand it the government has subpoenaed all it's witnesses for either today, tomorrow or starting next week.

MS. ERICKSON: They were all subpoenaed today and notified by telephone not to show up until notified.

THE COURT: And the record may reflect that we have 52 jurors here ready to go.

THE CLERK: 54.

THE COURT: 54 jurors ready to proceed.

The information I have is that the address given for Michael Crosby, Michael J. Crosby is 7004 Gleason Road, Edina, Minnesota, 941-587 is the phone number; that his wife is a person by the name of Joleen, J-O-L-E-E-N Benoit, B-E-N-O-I-T; that his father is Joseph Krzyzaniak, K-R-Z-Y-Z-A-N-I-A-K; his mother is Pamela Krzyzaniak; same spelling; that his parent's address is 1920 West 76th street, telephone number 869-3062. That is bother, one brother is Peter Krzyzaniak of Egan, Minnesota, the address I don't have. The phone number is 454-0962. He has another brother – why don't you get that file. I guess I left the file on my desk, the Crosby clerks file. Another brother Neil Krzyzaniak at Prior Lake, 445-6376, and [31] the statement was made to the Magistrate at that time of the detention hearing that he was going to be working for one or the other of those two brothers or maybe both who are apparently in the construction business.

It is ordered that the clerks office issue a warrant for the arrest of Michael J.Crosby and that you, Mr. Marshal undertake the services of your office to see if you can

locate him and I think you should prepare a written order for a bench warrant although you may consider it as if the bench warrant has been issued and undertake to locate him and take him into custody so that we can continue with our trial.

THE MARSHAL: Okay, Your HONOR.

THE COURT: So we can start our trial more properly. Will you arrange for a written order Ms. Erickson.

MS. ERICKSON: A written bench warrant.

THE COURT: Order for bench warrant.

MS. ERICKSON: Yes, Yes.

THE COURT: So the Marshal will have something in it's possession.

Now I need the clerks file. There was a detention hearing in this case heard before the Magistrate and he was ordered to appear at the pretrial offices each morning at 9:30. I think, do you have that memory?

MS. ERICKSON: I just looked at it during the break so I no it is in there. He also furnished a one hundred thousand [32] dollar surety bond with the Goldberg Bonding Company as surety.

THE COURT: You might, Mr. Marshal, notify Mr. Goldberg's office because he sometimes can be of assistance in locating those for whom he releases or furnishes the surety. He called me – what day were we here, Mr. Altman.

MR. ALTMAN: Friday.

THE COURT: Friday last he called me that day and convinced me on the phone that he did not intend to go to California but intended to get those records by way of a telephone conference with somebody out in California and I made a note of that, I think in the file, or you did, Sheri, a minute entry, and at the hearing on Friday he told us that it was his – ,his father's house I think that was serving as security for the bond.

Well why don't you folks, as sometimes is said, be attendant to the court and if he arrives we will start, if he doesn't we will wait and make a judgment as to what successes we have in locating him.

All right, Mr. Marshal, we will just wait and see what we can see during the course of the day. My sense is that we will wait surely until the end of the day and then we will make a decision at the end of the day whether we are going to – what we will do after we get further information from the Marshal's Office.

MR. ENGH: Does the court wish us to stay in St. Paul.

[33] THE COURT: Yes, I want you to stay right here until we find out what we are going to be doing. You meet with Ms. Erickson and get the additional materials and go through exhibits or do whatever else you can do to occupy your time but, yes, I want you to stay, and I want you and your clients to stay here in St. Paul.

All right we will stand in recess.

RECESS TAKEN.

(In chambers out of hearing of the jury)

THE COURT: We are in chambers with counsel to discuss scheduling and matters of law only without the clients.

It is now 12 o'clock and I have just checked with the Marshal's office, they have the warrant for Mr. Crosby's apprehension but they have no information for me as to his whereabouts. I have the jury coming back at 1:30. None of you have any additional information I take it as to – you have not heard from him. Mr. Altman.

MR. ALTMAN: No, Your Honor.

THE COURT: Which gives us some decisions to make as to how we are going to proceed.

The first thing I want to do is to reconvene at 1:30, quarter to two, to see if we have any information. I have asked the Marshal's office to let me no if they hear anything. He hasn't called your office Sheri?

THE CLERK: No, not that I know of.

[34] THE COURT: We don't have any message from anybody?

THE CLERK: No.

THE COURT: My plan would be I guess to postpone the trial until tomorrow or alternatively until Monday. I would like to think about whether I can or can not proceed in his absence. Have you thought about that?

MS. ERICKSON: Yes I have, Your Honor.

THE COURT: Under the current circumstances I am satisfied I can not, until I have more information as

to his whereabouts. He could be in a hospital for all I know.

MS. ERICKSON: The court is satisfied that he knew about the trial date and actually failed to appear. The Supreme Court cases that I have been able to find would permit us to proceed against him in his absence and the cases that I have are from about 1971 – 1975 and I have a law clerk downstairs updating that research right now.

The rule appears to require that the defendant be there at the beginning of the trial and that you proceed if he takes off and that is usually the way it happens. But the cases indicate that you can proceed against him in his absence even if he is not there at the outset of the trial and particularly in a multi-defendant case like this.

THE COURT: Well, we will be doing some research. I am not going to do anything until Monday, we have Friday, we didn't plan to work anyway.

* * *

[35] THE COURT: You haven't done any research Mr. Altman about proceeding in the absence of your client.

MR. ALTMAN: I have done a very little bit, Your Honor. For the record I would object to any proceedings in absentia.

THE COURT: Right. Well I am not going to make any judgment about that until Monday at the earliest in any event and that would give us four days to do research and, B, try to locate him. But you have your people working on cases?

MS. ERICKSON: Yup. I have an order for a bench warrant which is now lost in the middle of our computer.

THE COURT: I have already signed the bench warrant. If [36] you want to give me an order I will be glad to –

MS. ERICKSON: As soon as it will come out of the computer.

THE COURT: I ordered it off the bench so I am satisfied it is a proper warrant and I signed the warrant and it is in the custody – in the hands of the marshal. I don't know where they would start looking for Mr. Crosby to tell you the truth.

MS. ERICKSON: I think he hid at Tamara Kesler's house once before but we talked to her and she claims not to know where he is.

THE COURT: Like today?

MS. ERICKSON: I talked to his brother Philip Paul, he doesn't know where he is.

THE COURT: There were two brothers that appeared apparently at his detention hearing that avowed that they would let him work for them or some such thing. He was supposed to report in every day, that was a reporting requirement you were aware of?

MS. ERICKSON: All I knew is that my detention order had been – my detention motion had been denied and I assumed there were some pretty restrictive conditions on his release.

MR. ALTMAN: He had a daily reporting requirement.

THE COURT: In person to the –

MR. ALTMAN: That is right.

[37] THE COURT: To the pretrial detention office.

MR. ALTMAN: That is right and except for one minor glitch very early on he reported faithfully.

THE COURT: Of course Monday was a holiday so nobody was there so he probably didn't report to anybody on Monday.

Did you talk to Bud Goldberg?

MS. ERICKSON: I have not talked to Bud Goldberg.

THE COURT: You didn't talk to him either.

THE CLERK: You asked the marshal to do that.

THE COURT: Did I tell the marshal to talk to him? Goldberg sometimes can find people that nobody else can.

Okay I will see you at 1:30.

RECESS TAKEN

THE COURT: We are in chambers with counsel without the parties to discuss the current problem in the absence of Mr. Crosby and we have a marshal enroute who is going to give us an oral report as to the efforts of the Marshal's up to this point in time.

I can tell you that I talked to Mr. Goldberg, I did tell the marshal to talk to him, I had forgotten.

THE CLERK: Yes, you did.

THE COURT: Nobody had talked to him but I called him before noon and he was going to undertake to try to locate Mr. Crosby in as much as he is his bondsman, and he said he would report back to me this afternoon, let me know what he finds out [38] and the marshal will tell you momentarily I hope what he has found out.

Have you decided what you would like to do by way of trial or have you discussed that amongst yourselves or what, with your clients?

MR. HAWKINS: I guess for me, Your Honor, my preference would be to pass the matter until Monday morning a [sic] at 9:00 o'clock. But that is because of the situation that arose out of yesterday. I have got Copywright Printing, xeroxing I think as we speak, all of Mr. Engh's Jencks material, and I would like to do it on Monday just because it is going to give me a cushion, you know a handle – to go to do it, go ahead for trial on Monday.

MR. ENGH: On behalf of Mr. Cheatham –

THE COURT: You understand you don't have to make a final judgment we are not going to do anything until Monday.

MR. ENGH: We would like to see Mr. Crosby here for trial.

MS. ERICKSON: That is unanimous.

MR. ENGH: Really we want him here for strategic purposes.

THE COURT: Suppose we can't find him. Obviously we all would like to have him here except for perhaps – we all would like to have him here.

These are all the attorneys in the case. I thought [39] maybe you could just, with Mr. Lindberg present, give us a little report as to the information that has come to your attention since you have been commissioned to locate Mr. Crosby. Do you want to have a chair? Here is one right here. Catch the door there, Christy.

MR. HAWKINS: Or you can sit with us.

THE MARSHAL: Two deputies went to the Crosby residence, no one was home. They looked in the windows. The place looked like it is cleaned out. They are waiting for the landlord to come to let them in to search the place. His wife isn't home, she is an entertainer and they don't know exactly how to get in touch with her.

The neighbors saw him last night, he backed the Cadillac into the garage, just halfway into the garage which gave them the impression that he was doing something with the trunk, maybe packing, and that is all the information we have right now.

THE COURT: All right. In other words they were not able to locate him up to this point in time.

THE MARSHAL: Right, and it looks like they are not going to very soon, here in Minnesota.

THE COURT: You are going to check with his parents and his brothers perhaps.

THE MARSHAL: Well, we haven't at is [sic] this point.

THE COURT: No. I should tell you that I contacted Mr. [40] Bud Goldberg, he is the bondsman and sometimes he has been helpful in locating folks when they are not available to us.

There is a one hundred thousand dollar bond outstanding on Mr. Crosby. My present plan is to conduct a bond hearing tomorrow morning at 8:30 and I will so advise Mr. Goldberg and he will so advise the sureties on the bond and what we are going to do is kind of postpone the trial on a day by day basis at least until Monday. We wouldn't work on Friday in any event. So the lawyers are going to be available this afternoon and maybe we could have a little report at the end of the day if you have any other information or developments you could let us no [sic], and then we will kind of keep you posted as to what our plans are on this end. We have not made any judgment yet as to whether the case can go forward without him or should be postponed or exactly what we should do. No final decision will be made until Monday of next week.

THE MARSHAL: Okay.

THE COURT: But we are anxious to find him if he is in the State of Minnesota.

THE MARSHAL: We will find him if he is in the State of Minnesota. How does that sound?

THE COURT: That sounds great. Even if he is in the United States.

THE MARSHAL: Sounds good to me.

THE COURT: Thank you ma'am marshal for coming up. Now [41] that is as much as I know.

We are trying to get another case in. I have a couple of cases that could be tried in a day and a half, two days.

Well have you thought about – you don't have to tell me if you have decided, but have you thought about going ahead with him, without him, grant the severance that you apparently want? I guess those are some of the options, or else continuing the case for awhile to see if we can locate him.

I don't know what the speedy trial impact is on you [sic] other co-defendants, that is something we have to research and try to figure out. But, what have you thought about it.

MR. ENGH: Well if at all possible we would like him here. I know I am stating the obvious –

THE COURT: We would like him here too. If he is here we will go to trial, if he is not here then we have got to go to plan, "B," or maybe even plan can [sic], "C,".

MR. ENGH: It seems you have two options. You could postpone it a little bit but of course I think we all have scheduling problems, we kind of blotted off a month.

THE COURT: We all did, including Joan and her witnesses and all of you folks and me and the whole world.

MR. ENGH: I would have to consult more with Mr. Cheatham, but our preference still would be if he is

not here, if he is not here Monday, delay it another week. We would like him here.

[42] THE COURT: How about for Mr. Cunningham, have you thought – maybe haven't thought it through or have you? Don't decide them if you don't have to is Lindberg's rule.

MR. HAWKINS: Our basis for severance was in an effort to be able to have him testify.

THE COURT: Yeah this is true on the theory that he would help you.

MR. HAWKINS: On the theory he would help us. I have a separate theory if he is going to be jointly tried and won't testify.

THE COURT: Well the decision would be – the options would be continue the case until we find him or at least for a reasonable time until we find him.

MR. HAWKINS: I guess right now, based upon the courts ruling this morning, I would join Mr. Engh's suggestion in continuing the case until Monday, get a status on Monday and try and go on a short term basis to determine whether or not they can seize him whether it be in Chicago, Detroit, New York City or in Montreal, I don't know, and bring him back within a reasonable period of time, to go to trial based upon the rulings that the court made this morning.

THE COURT: Well Mr. Sessoms what do you say?

MR. SESSOMS: Well again my motion for severance was based on his potential availability as a witness.

I am inclined to want to have the case postponed until [43] he is apprehended. As long as it is a reasonable length of time.

THE COURT: All of you will have to talk to your clients about the implications of the speedy trial act. I frankly don't have any idea what it does – if they are willing to waive it until we find him that is one thing. If they are not, that is something else again; whether or not the absence of the principal defendant does or does not stay the proceedings, constitute excludable type delay, I don't have the foggiest idea.

MR. SESSOMS: I already talked to my client about that on various other occasions and I am sure that he will again indicate that he is out on bond and he is available and he wouldn't have any problem with waving his right to speedy trial.

THE COURT: What say you Ms. Erickson?

MS. ERICKSON: Well –

THE COURT: It ain't pretty, and of them.

MS. ERICKSON: No. they are bad. I second and third Mr. Engh's position that we would prefer to go to trial with Mr. Crosby personally present. His culpability is so much greater than the other defendants and the expense to the government is just tremendous. I mean I can't say it is not worth it for the other defendants but it is really worth it for Crosby. It is really worth it for Crosby and we are talking about victim witnesses I should say that are very, very old, 93, and blind. [44] We had one guy chop off his hand or two fingers off his hand

this morning. They are falling. I don't know how much longer they will be around.

So we have an interest in trying it as soon as possible. If we do try it earlier – well by earlier I mean maybe next week. I would really like to try Mr. Crosby in absentia. I don't know how we can try it twice.

A lot of these people are coming from Texas, coming from all over. I don't know that we could get them here twice.

THE COURT: You had better look up some law if that is what you are are – That is what you are doing I guess.

Why don't you do that and give us any cases that you have got, would you, or give them to all of us, these other folks too.

MS. ERICKSON: I have a set of cases. I don't have them with me.

THE COURT: Why don't you have somebody pound them out, give a copy to all these folks and give a copy to us. We don't have to decide anything right now but obviously it sets all of us in an up side down turmoil.

Why don't you just wait around until 4:00 o'clock, 4:30 and we will hopefully get another report from the marshal. I am going to call Goldberg and schedule a bond hearing tomorrow morning at 8:30. I don't know what I can do under those circumstances but I want Goldberg and the bonding – and [45] sureties on that bond here present at least. At least I would think they would want to be present. We may do a little checking on that too, whatever options there are, but I think I am entitled to

revoke the bond if I chose to, if I am satisfied he has become a fugitive. I am not going to waste any time doing so if that is the option that is available to me, you had better come to that, Mr. Altman.

MS. ERICKSON: I will come then and make a motion.

MR. ENGH: I take it the others defendant don't have to be at the bond hearing?

THE COURT: No, but if he is apprehended or shows up or walks in the court house I want to be ready to go. The problem is when do I tell 54 jurors to come back, that is the problem I have got.

MR. HAWKINS: My suggestion would be, Judge, based upon what the marshal told us, it is a reasonable assumption in my opinion that he was putting something in the trunk of his Cadillac last night for a reason and the reason probably being that he has absconded.

That being the case and Friday being a day of recess, it doesn't make a whole lot of sense unless you have another case to bring a bunch of jurors in – I rode up – the reason I say this, I rode up with some of the jurors who I believe were some of the jurors on the elevator this afternoon and they were talking about whether or not they are going to sit around [46] all afternoon again or get down to business.

THE COURT: They are madder than hell and I can guess – and I don't blame them and I can't tell them why we are not trying the case.

MR. HAWKINS: I would hate to have them come in tomorrow morning and be again sitting around all day.

THE COURT: I would hate to have to pay to have them come in tomorrow morning and sit around all day waiting for Crosby.

Maybe the thing to do would be to have them come back on Monday. I don't have any guarantee I will have him here Monday. What I am trying to do is get another case. I am trying to get one as late as this afternoon. If you think it is any fun for me to call in 52 jurors and tell them to go home again – do you have those case cases on trying him in absentia?

THE CLERK: Yes.

THE COURT: Why don't you go in and call Arlene Stassen and ask her to come down. Why don't you give these cases to your colleagues and give them to us. We are not going to decide it now, we may decide it on Monday or Friday as far as that goes.

My sense is we gather at 4:30, we can have the jurors call the code-a-phone tonight I suppose –

THE CLERK: Sure.

THE COURT: – if we don't have any definitive [47] information.

Has that Wilson guy called you.

THE CLERK: No.

THE COURT: Any of the guys know Wilson from St. Paul.

MR. HAWKINS: Tom Wilson?

THE COURT: Larry says he was in court with his client but we couldn't find him.

MR. ENGH: I saw him this morning.

THE COURT: Do you want to give Ms. Stassen a chair there.

We tried to keep you posted on an hourly basis down there.

MS. STASSEN: Sure, I believe you.

THE COURT: The last information we have ma'am jury clerk is that one of our – who appears to be our principal defendant, is not at his residence. The marshal reports that his residence appears to have been – to have some things removed or maybe everything removed. We are not quite sure. That last evening his Cadillac automobile was seen backed into the garage with the trunk open in what may have been an effort to pack up or do some such thing and we are not now aware of his whereabouts. You have 52 jurors down there going crazy I suppose.

My sense is that we might as well excuse them and if he doesn't come in this afternoon we are going to wait until [48] Monday. At the same time we will be trying to get another case in. If we could get one in this afternoon we will start trial, if we could get ahold of the lawyers.

They are really hard to get ahold of, I know.

Sheri try that Wilson one more time, go call him.

MS. ERICKSON: I thought that was possession of stolen mail.

THE COURT: That is the one, we are trying to get, either one. I have two cases I could work in between now and Monday but I have to try to work with the jury to solve that problem. You have problems with witnesses I have problems with jurors.

MS. STASSEN: Judge Devitt will start a trial Monday afternoon. I am going to have jurors for him for Monday afternoon. Magnuson was, but his went away this morning so I already have jurors coming for Monday, but some of them were going to be left over from this.

THE COURT: Yeah. Devitt is not starting until the afternoon. If I start at 9:00 o'clock I could get a jury picked by afternoon for Devitt so you could have the left overs, but what I was thinking is there – could we have these folks call in tonight about tomorrow.

MS. STASSEN: Um-hum.

THE COURT: My sense is we are not going to find this man between now and the close of business today.

[49] MS. STASSEN: How much can I tell those people?

THE COURT: That is the problem you can't tell them we can't try the – what I am going to have them do is go in the courtroom.

MS. STASSEN: They are in Judge Devitt's courtroom right now because the naturalization ceremonies are going on and they have coffee in the jury room.

THE COURT: What I want to do, go in and tell them we can't try, we can't proceed with our trial today for reasons that I am not at liberty to disclose to them but assure them that it is – well that is all I can tell them I guess, and tell them we are trying to work around the scheduling problem that we have and is that what you want to do, tell them that they should call in tonight – the options would be come in tomorrow or do you have them by letters A through –

MS. STASSEN: L and M – they are panels L and M.

THE COURT: If I could get another case in tomorrow where I don't need 52, all I need is 30ish.

MS. STASSEN: That would be okay, being I think we are going to lose a few out of this bunch.

THE COURT: I have been trying to get another case in all day and I can't get a hold of the lawyer.

MS. STASSEN: If you go in I will go with you, we will take my list and we will find out who absolutely can not come.

THE COURT: You can do this after I leave. I just [50] want to excuse them. Tell them we have a problem I can't tell them about, and that is all I can tell them.

What you want for tomorrow is criminal, is that correct?

MS. STASSEN: Yeah.

THE COURT: All I have is a criminal, I am on a criminal roll, I can't get two of them and then I am trying

to go to Duluth too. This is really screwed up, its screwing everybody up and these defense guys and you and everybody.

MS. ERICKSON: You have know [sic] idea how hard it was to schedule General Yeager.

THE COURT: I have sold the popcorn concession out for him too, I have a lots of folks that will be disappointed.

MR. HAWKINS: My agent gets the autograph, right.

THE COURT: I only have two weeks before Duluth, there is no way we can finish.

MS. ERICKSON: Does anybody here care I am getting married December 10.

MR. HAWKINS: I do.

THE COURT: Is that at St. Olaf?

MS. ERICKSON: Carlton.

THE COURT: Where is Carlton located do they have a college?

MS. ERICKSON: Yeah, but they got a couple of good ones down there.

[51] THE CLERK: I couldn't get a hold of anybody.

THE COURT: Off the record.

(Off the record discussion held)

THE COURT: Now we are all in the courtroom, clients, lawyers and the like. Ma'am marshal do you want to give us a little – any further information you have as to the whereabouts of Mr. Michael Crosby.

THE MARSHAL: Your Honor, as of this time we have not located Mr. Crosby and I don't have any update on how the investigation is going.

THE COURT: It is just on going in an effort to try to locate him.

THE MARSHAL: Yes, Your Honor.

THE COURT: Okay thank you.

I should tell counsel that I have been in contact with the bonding company that furnished the bond on behalf of Mr. Crosby and I have scheduled a bond revocation – bond forfeiture hearing for tomorrow morning at 8:30 and I have so advised the bonding company and he in turn representatives of the bonding company. He advised me that he will notify the guarantors of the bond namely a Mr. Joseph Krzyzaniak and a Mr. Neil Krzyzaniak and the Wood Bridge Ponds Development people and advised them that they would be well advised to be here present tomorrow for that purpose.

Mr. Altman I think you should be here please.

[52] MR. ALTMAN: Yes, Your Honor.

THE COURT: So I guess our trial will be continued on a day-to-day basis and my sense is that we will not start trial tomorrow under any circumstance but simply because I can't get 54 jurors, I am not disposed to ask 54 jurors to come back although I full well intend to

reimburse the government for the expenses incurred in bringing in the jury absent some extraordinary circumstance with reference to Mr. Crosby that I am not now familiar with.

So my suggestion is that we continue the case until Monday. Now do you have any additional law that you want to furnish to me Ms. Erickson with reference to continuing a trial in absentia or have the cases you have given us exhausted your efforts at research in that regard too?

MS. ERICKSON: The court and defense counsel have all the cases I have up to this point and we will continue to research the matter but that is all we have done since the last time we met.

THE COURT: It is your sense based on your research that the attorney for Mr. Altman (sic) stays and participates or doesn't stay and participate?

MS. ERICKSON: I haven't looked at that. The only case I know of where the defendants where tried in absentia was it was part of the Craigness (ph) –

THE COURT: I am sorry part of what?

[53] MS. ERICKSON: Some of the Craigness (ph) defendants, it was a RICO case that we tried in front of Judge Devitt and some of the Defendants were severed and sent out to Maryland and fled. They were tried in absentia and I believe their attorneys went ahead and represented them even though they weren't there and that is my only experience on that.

THE COURT: Do you have any thoughts or law on the subject Mr. Altman.

MR. ALTMAN: Your Honor I will be opposing a trial in absentia but just based upon what I have read it appears that if a trial goes forward on that basis that defense counsel continue in the case.

THE COURT: Just continue on as if it is – if the defendant were present.

MR. ALTMAN: That is correct.

THE COURT: All right do any of you have any cases that you want me to be attentive to with reference to trial in absentia other than those that the government has furnished to us.

(No response).

THE COURT: We will take a look at your cases.

I would be appreciative if you attorneys would make yourselves available by phone at least so we know where to reach you. We are having a lot of difficulty in trying to schedule a case for tomorrow but what I may do after I have had a chance to [54] look at those cases tomorrow is to get you in here on Friday at least for half an hour or so to discuss the issue of whether we go ahead on Monday or not with our trial, assuming that Mr. Crosby is not available, then we would still go ahead with the trial.

That is the position of the government, the government is going to be urging the court to go forward in any event?

MS. ERICKSON: Yes, it is.

THE COURT: And that Mr. Altman would be opposing. And as to the other defendants, I don't know if

you have a position in that regard or not. Obviously you would all like to have him here.

MR. ENGH: Our position on behalf of Mr. Cheatham is that we would prefer Mr. Crosby is here and if he is not here we would ask for a continuance until he is arrested. I say that on behalf of Mr. Cheatham after consulting with him about the complexity of the situation and also his right to a speedy trial.

THE COURT: I am sorry I didn't hear the last part.

MR. ENGH: We would be willing to waive his speedy trail claim in order to have Mr. Crosby here. That seems to be one of the side issues in all of this, if the court does delay it, but Mr. Cheatham would be willing to waive his right to a speedy trial.

THE COURT: All right and Mr. Hawkins?

[55] MR. HAWKINS: Your Honor, Mr. Cunningham's position or defendant Cunningham's position is we would like Mr. Crosby here. Further Mr. Cunningham has once filed a motion for a continuance and excludable delay and is willing to waive his right at this time also to a speedy trial so Mr. Crosby could be present.

THE COURT: All right. Mr. Sessoms do you have a position yet or are you still developing a position.

MR. SESSOMS: No, Your Honor, our position is the same as the other defendants.

THE COURT: You would oppose going forward without the defendant Crosby here present.

MR. SESSOMS: Yes we would be asking for a continuance as well.

THE COURT: And would agree to waive your speedy trial rights.

MR. SESSOMS: Yes, sir, Your Honor.

THE COURT: You other defendants are welcome to be present here tomorrow morning at 8:30 you are not required to be here but if you would like to be here I want you to feel free to come and learn whatever it is there is to learn about our efforts to to locate him or the efforts of the bonding company to locate him. I can tell you that the bonding company has their own investigation on going in an effort to locate him. Have they been in contact with you to.

[56] THE MARSHAL: No, Your Honor, but they might have been in contact with Minneapolis where the main investigation is being conducted.

THE COURT: They also have been in contact with our pretrial service people.

All right we will continue the case until at least Monday and you will be in touch with Ms. Frette or I with you folks to let you know of any developments occurring on our end and Mr. Altman I will see you at. 8:30 tomorrow morning.

MR. ALTMAN: Yes, Your Honor.

THE COURT: All right, thank you.

(whereupon the proceedings came to a close)

* * *

[Trial proceedings on October 13, 1988]

[58] WHEREUPON, the following proceedings were had:

THE COURT: Good afternoon. I – maybe we had better take a roll first. United States of America by –

MS. ERICKSON: Joan Erickson, United States Attorney.

THE COURT: That is Mr. Callinan with you.

MR. CALLINAN: Yes it is, Your Honor.

THE COURT: And Mr. Altman here for Mr. Michael Crosby. Do you have any additional word about Mr. Crosby, Mr. Altman, to pass on.

MR. ALTMAN: No, Your Honor.

THE COURT: All right. Mr. Sessoms is here for Mr. Sannes, both present.

MR. SESSOMS: Yes, Your Honor.

THE COURT: Mr. Hawkins is here with Mr. Cunningham, both present.

MR. HAWKINS: Correct, Your Honor.

THE COURT: Mr. Engh is here with Mr. Cheatham, both present.

MR. ENGH: That is right.

THE COURT: All right. Also we have marshall Leiverson and, Mr. Marshal, if you would step forward

and give us any additional information or lack thereof that you can tell us about Mr. Michael Crosby I would be grateful. You are still under oath for purposes of this proceedings.

MR. LEIVERSON: Yes, Your Honor. At the present time, [59] Your Honor, have no further information on the where abouts of Mr. Crosby. I spoke with his wife again today and she has not be in contact with him. She has no knowledge where he might be. At this time we are still pursuing leads that we have. Nothing as yet has come up with anything.

THE COURT: You are unable to locate his vehicle either?

MR. LEIVERSON: We have not come up with his vehicle, Your Honor. She provided information for the blue MG Midget that belongs to her. The Mercedes she has no knowledge of where it was leased from or where it could be and she knows that he also has a white Cadillac but she has no idea where that vehicle is either.

THE COURT: All right. Anybody else here present have any information about Mr. Crosby's whereabouts. I hear no response.

Since our last meeting I have gone to the books as they say and I have reviewed a number of cases, the same cases you folks I am sure have been reviewing. The principal case seems to be a case entitled United States versus Tortora at 464 F2d 1202, Second Circuit, 1972; it makes reference in that case to a Supreme Court case, I don't have the opinion here with me now. I also read some cases from the Fifth Circuit as I remember; another

case from the Second Circuit was United States versus Sanchez (ph) 790 F2d, I can't read my writing, 240 or 245. I [60] read the Fifth Circuit cases of United States versus Benavides, 596 F2d 137, a 1979 Fifth Circuit case and the United States versus Beltran (ph) 516 F2d 287, Fifth Circuit case, 1983, both, – both of which cases I think the Judge went ahead and tried the case in absentia, the trial Judge, and was reversed by circumstances that I am satisfied are completely different than the circumstances in this case.

I have made a judgment that the proper way to proceed with the trial of this case, after the making of appropriate findings, is to proceed to trial in the absence of Mr. Crosby as to all defendants including Mr. Crosby. The alternatives to that are so horrendous from my standpoint and from your standpoint and the standpoint of the government and the witnesses that I think they are unacceptable and I am going to make the requisite findings, I will make them in writing, but I have prepared them now and will recite them for the record at this time. They will be findings of fact.

I had prepared them not knowing exactly what report I would get from the marshal but the marshal just confirms the absence of Mr. Crosby unexplained.

The governments position is, if you want to state your position, that is you want to go ahead as I understand it?

MS. ERICKSON: Yes. The government now formally moves to try Mr. Crosby in absentia beginning Monday, if possible.

THE COURT: And all other defendants. Now do you [61] folks want to state your positions for the record.

MR. ALTMAN: On behalf of Mr. Crosby we would oppose the motion, Your Honor.

THE COURT: All right, anybody else?

MR. ENGH: On behalf of Mr. Cheatham we oppose the motion. We suggested in chambers that the court perhaps kick the case over another week to allow the authorities a chance to find Mr. Crosby. Our position is that we prefer to have Mr. Crosby here and we would waive any right to a speedy trial. We do object to the court's decision for the record.

THE COURT: All right. Anybody else?

MR. SESSOMS: On behalf of Mr. Sannes we have the same position as Mr. Cheatham. We would object to Mr. Crosby being tried in absentia because we would like the opportunity to see if we can he can be found in order that he might provide exculpatory information on behalf of Mr. Sannes.

THE COURT: All right.

MR. HAWKINS: Your Honor, on behalf of defendant Cunningham, we would object and also move to have the matter continued in an effort to attempt to locate Mr. Crosby. In doing so I would renew my motion for severance from Mr. Crosby on the ground being tried with Mr. Crosby in absentia is even more prejudicial than having him being tried together with Mr. Cunningham if he were personally present. I think the inference that there is no question that criminal activity is afoot when

[62] an individual flees is going to spill over on to Mr. Cunningham and deny him a right to a fair trial in the absence of Mr. Crosby.

THE COURT: All right. The motion for severance is denied.

We will talk a little bit about how we will handle his absence from the standpoint of fleeing. I don't intent to get into fleeing, I just intend during the trial, and we can talk about that if you would like, we are just going to go ahead and he is not here and it will be obvious to everybody he is not here but the reasons why he is not here, or the fact that he was supposed to be here and isn't here, or any of that, I don't intend to get into, and keep that in mind.

But at the same time, to the Marshal's who are here present, the fact that we are going to go ahead should not deter you in your efforts to locate Mr. Crosby and indeed I would hope that you would continue with your good efforts in that regard, you and the other members of the Marshal's office, whatever else is available to you to try to locate him; and the fact that we go ahead is not to be indicating that we are not still trying to locate him.

MR. HAWKINS: Your Honor in that regard it appears from the newspaper article yesterday that his lack of presence hear is going to be known to the jurors. It is implicit or explicit based upon the articles of the paper.

[63] THE COURT: We will have to make inquiry of the jurors of what they read. The last thing the jury clerk told the jurors on Wednesday was that they were not to, and they were instructed not to read or listen to

any news accounts with reference to matters in the United States District Court.

Now to the extent to which they did or did not follow that admonition I have nc way of knowing. But we will have to find that out on voir dire. If it becomes obvious during voir dire that we can't get a jury – obviously I am not excited about the publicity that Mr. Crosby has brought to the beginning of our trial, but that is the way the world works and we don't live in a perfect world and we will try to proceed. If it becomes obvious that we can't, the fact that they have read it I don't think makes it impossible for us, indeed some of the stories I saw were exculpatory of your client, told about what Crosby was going to testify, so it is a mixed bag.

We are in a situation that none of us like to be in, you, me, the government, any of us. But we are in this situation because one of the defendants has left the area.

Well, based upon the record that has been made in this case up to this point in time the court makes the following findings of fact:

One: – and I can give you a copy of this Larry – the defendant Michael J. Crosby had complete, full and adequate notice of the charges and proceedings against him in this action [64] and had complete, full, and adequate notice of a scheduled trial date of October 12, 1988 at 9:30am.

In that regard at a pretrial conference on August 15, 1988, at which the defendant Crosby was present, the court advised counsel and all parties of the trial setting of October 12, 1988.

On September 12, 1988 the office of the clerk sent to all counsel a notice of jury trial advising all parties through their counsel that the action had been set for trial in St. Paul, Minnesota, on Wednesday, October 12, 1988, at 9:30 am.

On September 30, 1988 at a pretrial conference at which all counsel and all parties except the defendant Tamara M. Kesler were present, the court again notified the parties and their attorneys of the trial date of October 12, 1988.

At that pretrial conference and in the presence of defendant Crosby, his counsel Douglas Altman advised the court that he had no objection to the October 12, 1988 trial setting.

At a hearing conducted on October 7, 1988 on various motions made by the defendant Michael J. Crosby through is counsel, the trial setting of October 12, 1988 was again referred to by the court and counsel.

Two: Three co-defendants, Martin Cheatham, James Sannes, and Jack Cunningham and their counsel appeared and stood ready to begin trial on October 12, 1988 after a denial of their motion for severance.

[65] Three: on October 12, 1988 the defendant Michael J. Crosby failed to appear for trial. On that date the court ordered and executed a warrant calling for the apprehension of Michael J. Crosby. At that time and place all counsel, all other parties, the Judge, all court personnel, and 54 jurors were present and ready to commence trial of the action.

Four: The office of the United States Marshal has advised the court and counsel that in attempting to execute the warrant they were unable to locate the defendant Crosby at his place of residence in the District of Minnesota. A search of his residence by the Marshal's would indicate that the residence has been abandoned by the defendant Crosby.

Additionally, the court at this time has been further advised that notwithstanding a 5 day or 4 day postponement of the trial until Monday, October 17, the Marshal's service remains unable to locate or apprehend the defendant Michael J. Crosby.

Five: The court has, pursuant to 18 USC 3146 (d) declared a forfeiture of the one hundred thousand dollar recognizance bond filed by the defendant Crosby, all pursuant to a hearing conducted in open court on October 13, 1988 at which time there were present counsel for the government, counsel for the defendant, Mr. Allan G. Goldberg representative of the International Fidelity Insurance Company; *and the defendant's* father Joseph Krzyzaniak and bother Neil Krzyzaniak, both of [66] whom assisted in arraigning for the bond filed on behalf of defendant Crosby.

Six: none of the parties present at the hearing for forfeiture on October 13, 1988, were able to provide any information to the court as to the defendant's whereabouts nor are any of the parties present here today, October 14, 1988, able to provide any such information.

The defendant Crosby has deliberately, voluntarily, and knowingly, and without justification, failed to be

present at the designated time and place for the trial of of the action.

Eight: No evidence has been presented to the court as to the defendant's present whereabouts and there is no reasonable probability that the defendant could be located shortly, or that the trial can be rescheduled with the defendant Crosby in attendance.

Nine: The rescheduling of this trial would present extreme difficulty to the government, to the witnesses for the government, the defense counsel, and to the court.

Ten: The possibility of having to undertake two trials of this action would impose a substantial burden upon the government, on the witnesses from the government, and on the court.

The government has listed 83 potential witnesses and in excess of 100 proposed exhibits for trial of this action.

Eleven: The conduct of more than one trial in this [67] action would place an undue burden on the multitude of witnesses proposed to be called by the government, many of whom are elderly or infirm.

Upon the foregoing facts the court makes the following conclusion of law:

First: The defendant Michael J. Crosby has voluntarily waived is constitutional right to be present during the trial of this action.

Second: The public interest in proceeding with a trial of this action in absence of the defendant Michael J. Crosby outweighs the interest of the defendant Crosby to be present during the conduct of the trial of this action.

Upon the foregoing it is ordered that the above action continue to trial on October 12, in the absence of defendant Michael J. Crosby.

That order will be signed by the court today and filed and I think is consistent with the law as I understand it to be and we will start the trial on Monday in his absence.

My sense is that we will proceed much as we intended to. It is going to be a situation where the absence of Mr. Crosby is going to be obvious and yet there will be no reference to the fact that he has fled or is under a warrant for his arrest or whatever. The fact of the matter is we are simply going to go ahead and try it without a defendant present and I don't want the government to make any reference to that and I [68] don't want the defense counsel to make any reference to that, certainly without making some kind of a showing in chambers or in camera that that is relevant to our inquiry.

* * *

MS.ENGH: Your Honor, your ruling regarding the fleeing.

THE COURT: I am sorry.

MR. ENGH: Whether or not Mr. Crosby fled, you made a ruling before trial started on whether or not defense counsel can inquire as to why he left or the fact that he did flee and I would take exception to the court on that. It may we will be that the defense strategy in this case, we may wish to mention that Mr. Crosby didn't – did indeed flee on the charges and may [69] well indeed want to mention that Mr. Crosby stiffed his own family.

THE COURT: I am not quite hearing you.

MR. ENGH: It seems to me maybe the court is premature in making that ruling. I sense that on behalf of Mr. Cheatham I may want to bring out the fact that Mr. Crosby stiffed his own family. I think that the government surely can anticipate the argument you can make with a defendant who stiffs his own father –

THE COURT: I am not going to get into stiffing his own father in this trial. It may be the fact that he fled may have something to do with it.

MR. ENGH: I would certainly want to explore that.

THE COURT: You may.

MR. ENGH: I was concerned that your ruling precluded that.

THE COURT: I say what I would like you to understand is I don't want anybody to make any reference to it without making some showing in camera at the bench, in chambers or however; rather than just blurting it out, "on by the way where is Mr. Crosby, now that he didn't show up last Monday", whatever. If you want to present some evidence about that, and the government may, I don't know, but before anybody does I say let's sit down and talk about the impact of it.

MR. ENGH: I think we are going to make an effort to do [70] that.

THE COURT: Just show that he didn't show up?

MR. ALTMAN: Your Honor for the record I think any statement either by the government or by co-

defense counsel in connection with flight would be improper and I would oppose it.

THE COURT: If you want to give me some law as to the admissibility of it we will deal with it when it comes up. All I am asking is we not blurt it out without talking about it in advance. All right did you have anything more you wanted to say.

MS. ERICKSON: Just on the same point, since we are not going to discuss it now or straighten it out now there is no reason to cite any cases. I did have a case Sanchez (ph) which was also cited by the court for the proposition that evidence of flight can be admitted when the person hasn't shown up for trial and –

THE COURT: In one of those cases the Judge instructed the jury about the effect of flight and my sense is, my present sense is that I don't think I want to do that. But I haven't made any final conclusion about it. This is a new experience for me and I assume it is for all of you folks too.

MS. ERICKSON: It is new for us.

THE COURT: But I do have a lot of new things every day so I don't know. But, yes, there is an instruction that evidence of flight is evidence of guilt but let's take one day [71] at a time and let's not talk about it in the presence of the jury. Let's get our jury picked and see if we can't get this trial started. That is my concern. Maybe you could streamline your case a little bit now that Mr. Crosby won't be here, at least to start, or maybe he will be here, I don't know.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
3-88 CR 40(1)

(Caption Omitted In Printing)

ORDER

The above matter is before the court upon the motion of the government to proceed with the trial of the above-entitled action in the absence of the defendant Michael J. Crosby.

Based upon all files, records, and proceedings had herein, the court makes the following:

FINDINGS OF FACT

1. The defendant Michael J. Crosby had complete, full, and adequate notice of the charges and proceedings against him in this action and had complete, full, and adequate notice of a scheduled trial date of October 12, 1988, at 9:30 a.m. In that regard:

a) At a pretrial conference on August 15, 1988, at which the defendant Crosby was present, the court advised counsel and all parties of the trial setting of October 12, 1988.

b) On September 12, 1988, the Office of the Clerk sent to all counsel a notice of jury trial advising all parties through their counsel that the action had been set for jury trial at St. Paul, Minnesota on Wednesday, October 12, 1988, at 9:30 a.m.

c) On September 30, 1988, at a pretrial conference at which all counsel and all parties, except the defendant

Tamara M. Kesler, were present, the court again notified the parties and their attorneys of the trial date of October 12, 1988. At that pretrial conference, in the presence of the defendant Crosby, his counsel Douglas Altman advised the court that he had no objection to the October 12, 1988, trial setting.

d) At a hearing conducted on October 7, 1988, on various motions made by the defendant Michael J. Crosby through his counsel, the trial setting of October 12, 1988, was again referred to by the court and counsel.

2. Three co-defendants, Martin Cheatham, James Sannes, and Jack Cunningham, and their counsel, appeared and stood ready to begin trial on October 12, 1988, over denial of motions for severance.

3. On October 12, 1988, the defendant Michael J. Crosby failed to appear for trial. On that date the court ordered and executed a warrant calling for the apprehension of Michael J. Crosby. At that time and place all other counsel, all other parties, the judge, all court personnel, and 54 jurors were present and ready to commence trial of the action.

4. The Office of United States Marshal has advised the court and counsel that in attempting to execute the warrant they were unable to locate the defendant Crosby at his place of residence in the District of Minnesota. A search of his residence by the Marshals would indicate that the residence has been abandoned by the defendant Crosby.

5. The court, has pursuant to 18 U.S.C. § 3146(d), declared a forfeiture of the $100,000.00 recognizance bond

filed by the defendant, all pursuant to a hearing conducted in open court on October 13, 1988, at which time there were present counsel for the government, counsel for the defendant, Mr. Allan G. Goldberg, representative of the International Fidelity Insurance Company, and the defendant's father Joseph Krzyzaniak and brother Neal Krzyzaniak, both of whom assisted in arranging for the bond filed on behalf of the defendant.

6. None of the parties present at the hearing for forfeiture on October 13, 1988, were able to provide any information to the court as to the defendant's whereabouts.

7. The defendant Crosby has deliberately, voluntarily, knowingly, and without justification failed to be present of the designated time and place for the trial of the action.

8. No evidence has been presented to the court as to the defendant's present whereabouts and there is no reasonable probability that the defendant could be located shortly or that the trial could be rescheduled with the defendant Crosby in attendance.

9. The rescheduling of this trial would present extreme difficulty to the government, to the witnesses for the government, to defense counsel, and to the court.

10. The possibility of having to undertake two trials of the above-entitled action would impose a substantial burden upon the government, on the witnesses for the government, and on the court. The government has listed 83 potential witnesses and in excess of 400 proposed exhibits for the trial of this action.

11. The conduct of more than one trial in this action would place an undue burden on the multitude of witnesses proposed to be called by the government, many of whom are elderly or infirm.

12. Upon the foregoing, the court makes the following:

CONCLUSIONS OF LAW

1. The defendant Michael J. Crosby has voluntarily waived his constitutional right to be present during the trial of this action.

2. The public interest in proceeding with the trial of this action in the absence of the defendant Michael J. Crosby outweighs the interest of the defendant Crosby to be present during the conduct of the trial of this action.

3. Upon the foregoing,

IT IS ORDERED That the above-entitled action continue to trial on October 17, 1988, in the absence of the defendant Michael J. Crosby.

DATED: October 19 , 1988.

/s/ Donald D. Alsop
DONALD D. ALSOP
Chief U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5450

United States of America, Appellee, v. Michael J. Crosby, Appellant.	* * * * * * *	Appeal from the United States District Court for the District of Minnesota.

Submitted: May 18, 1990

Filed: October 16, 1990

Before JOHN R. GIBSON, Circuit Judge, BRIGHT, Senior Circuit Judge, and FAGG, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

Michael J. Crosby did not appear in court on the date set for commencement of his criminal trial, was tried *in absentia*, and was convicted. The issues in this case revolve primarily around this somewhat unusual circumstance and whether Rule 43 of the Federal Rules of Criminal Procedure applies because Crosby was not present when the trial commenced. We hold that a defendant who

does not appear for his criminal trial, including the commencement of it, waives the protections of Rule 43 and the rights incorporated in that rule. We affirm the conviction.

Crosby was charged, together with Martin Cheatham, James Sannes and Jack Cunningham, with numerous criminal offenses arising out of a fraudulent scheme in which customers paid for, but never received, silver commemorative medallions. The facts are set out in detail in *United States v. Cheatham*, 899 F.2d 747, 748-50 (8th Cir. 1990), and for the most part are immaterial to the issues presented in this case. It suffices to say that the case was set for trial on October 12, 1988. Crosby was present at a pretrial conference on August 15, 1988, when the court[1] advised counsel for all parties of the trial setting. On September 12, 1988, the clerk sent a notice to all counsel confirming the date. On September 30, 1988, Crosby was present at a pretrial conference and, again, the court notified the parties and attorneys of the October 12 trial date. At that time, Crosby's counsel informed the court that he had no objection to the October 12 trial setting. On October 7, the trial court heard various motions which Crosby made through his counsel, and again the trial setting of October 12 was referred to by court and counsel.

On October 12, 1988, Cheatham, Sannes and Cunningham and their counsel appeared, ready for trial. Crosby failed to appear. The district court ordered a

---

[1] The Honorable Donald D. Alsop, Chief Judge, United States District Court for the District of Minnesota.

warrant issued and executed. As the district court stated in its order entered on October 14, delaying trial until October 17, "all other counsel, all other parties, the judge, all court personnel, and 54 jurors were present and ready to commence trial." *United States v. Crosby*, No. 3-88 CR 40(1), slip op. at 2 (D. Minn. Oct. 14, 1988). The marshal's office informed the court and counsel it was unable to locate Crosby at his residence. The order delaying trial stated: "[A] search of his residence by the Marshals would indicate that the residence has been abandoned by the defendant Crosby." *Id.* at 2-3. The district court ordered Crosby's bond of $100,000 forfeited and found that Crosby "deliberately, voluntarily, knowingly, and without justification failed to be present at the designated time and place for the trial of the action." *Id.* The court further found that no evidence was presented as to the defendant's whereabouts and there was no reasonable probability that he could be located shortly or the trial rescheduled with Crosby in attendance. *Id.* observing that the government had listed eighty-three potential witnesses and more than four-hundred proposed exhibits for the trial, the district court found that rescheduling posed extreme difficulties and that undertaking two separate trials would place a substantial burden on the government and the court. The court found that Crosby "voluntarily waived his constitutional right to be present during the trial" of the action and "[t]he public interest in proceeding with the trial in the absence of . . . Crosby outweigh[ed] the interest of the defendant Crosby to be present during the conduct of the trial. . . . " *Id.* at 4.

The trial commenced October 17, and the jury rendered a verdict November 18, 1988, finding Crosby guilty

on twenty-five counts of mail fraud. Crosby was arrested on June 14, 1989 and later sentenced to four consecutive five-year terms on twenty-two of the counts; the trial judge suspended imposition of sentence on the three remaining counts, and placed Crosby on five years probation to commence upon completion of the sentences on the other counts, conditioned upon payment of $550,000 restitution to the victims during the period of probation. Insofar as other facts are material to the issues raised, they will be set forth with respect to each of the arguments.

I.

Crosby argues that Rule 43 of the Federal Rules of Criminal Procedure plainly requires his presence at the commencement of trial as a prerequisite to continuing the trial in his absence.[2] He argues that Rule 43 incorporates

---

[2] Rule 43 provides in relevant part:

(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, *initially present*,

(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial). . . . (emphasis added).

preexisting law as set forth in *Diaz v. United States*, 223 U.S. 442 (1912). In *Diaz*, a criminal defendant voluntarily absented himself from his own trial on two separate occasions, but nonetheless consented that the trial should proceed without him. *Id.* at 445. Diaz appealed his conviction on the ground that his absences from trial prevented him from exercising his constitutional right to confront all witnesses who testified against him. The Supreme Court rejected Diaz's claim, relying on the prevailing rule that:

> [W]here the offense is not capital and the accused is not in custody, . . . if, after the trial has begun in his presence, [the defendant] voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.

Id. at 455 (citations omitted). *Diaz* dealt only with the situation where a trial had commenced and the defendant thereafter voluntarily absented himself.

In essence, Crosby's argument is based upon the plain language of Rule 43. Crosby interprets paragraph (b) of Rule 43 to say that before a court can try a criminal defendant *in absentia*, the defendant must have at least been present at the outset of the trial. Crosby recognizes that a number of other circuits have held contrary to his position, but criticizes the reasoning in those decisions and particularly their treatment of *Diaz*. He also points to the extreme prejudice resulting from his absence at trial. On the strength of these two points, Crosby asks us to set

aside the district court decision and remand this case for a new trial.

This circuit has not yet dealt with the application of Rule 43 where a criminal defendant such as Crosby is tried and convicted *in absentia*. Other circuits facing the issue have allowed convictions to stand on a theory of waiver. We are persuaded that we should do likewise.

The notes of the advisory committee on rules make clear that the first sentence of Rule 43 is a restatement of existing law. Fed. R. Crim. P. 43, notes of advisory committee on rules (note 1). We are satisfied that the language of Rule 43 does no more than restate the holding in *Diaz*. The reasoning in *Diaz* applies equally to the factual circumstances in this case where the defendant fails to appear for commencement of trial, as it does in the situation where the defendant appears at the commencement and then absconds. In both cases, the defendant waives his Rule 43 right to be present during trial when he voluntarily absents himself from the courtroom.

In discussing this issue in *Government of the Virgin Islands v. Brown*, 507 F.2d 186, 189 (3d Cir. 1975), Judge Rosenn pointed out that Rule 43 was merely a paraphrase of the holding in *Diaz*. In *Brown*, the defendant was absent from court on the first morning of voir dire. He appeared in court that afternoon, made no explanation for his earlier absence, and observed the remaining voir dire examination without making any objection. Brown was present throughout the remainder of his trial. Following conviction, Brown appealed to the Third Circuit, arguing that conducting the voir dire proceedings of the first morning in his absence violated his constitutional

and statutory rights. The Third Circuit rejected his claim, holding that "Brown's willful absence from the voir dire examination . . . was knowing and voluntary, and that this voluntary absence was a waiver of both his constitutional and statutory right to be present at the commencement of his trial." *Id.* at 189.

We agree with Judge Rosenn that there are no talismanic properties "which differentiate the commencement of a trial from later stages." *Id.* In fact, the voir dire examination is probably not as critical as cross-examination of the key witnesses, which occurs in the later phases of a trial. It would be anomalous to attach more significance to a defendant's absence at commencement than to absence during more important substantive portions of the trial. *Id.* Judge Rosenn did note that the commencement of trial would take on special significance under the rule if the defendant did not know when the trial was to begin, since in that case he could not be said to have knowingly waived his right to be present. *Id.* In *Brown*, however, one of the conditions for the defendant's release on bail was that the defendant appear at the start of the trial. Thus, it was clear that the *Brown* defendant knew his trial date.

The facts in Crosby's case are identical in many respects to those in *Brown*. Both defendants were released from custody on bail before their trial. Both voluntarily failed to attend the beginning of trial and neither offered any explanation for his absence. Crosby knew beyond question that his trial would start on October 12. In Crosby's case, as in *Brown*, the district court painstakingly outlined the times when Crosby received and acknowledged notice of that date.

Our decision to follow *Brown* is bolstered by the fact that other circuits have treated this issue in similar fashion. In *United States v. Peterson*, 524 F.2d 167 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976), the Fourth Circuit also concluded that a defendant's voluntary absence at the commencement of trial was a waiver under rule 43 just as if the defendant had attended the beginning of a trial and then later absconded. The court reasoned that:

> [t]o permit a defendant, free on bail, to obstruct the course of justice by absconding without a compelling reason, after having received actual notice of the time and place of trial, is as inconsistent with the purposes of the rule as to permit a defendant to abscond after the trial has commenced. We therefore hold that a defendant may waive his right to be present at the commencement of his trial just as effectively as he can waive his right to be present at later stages of the proceedings.

Id. at 184.

The Second Circuit in *United States v. Tortora*, 464 F.2d 1202, 1208 (2d Cir.), *cert. denied, Santoro v. United States*, 409 U.S. 1063 (1972), reached a similar conclusion, stating:

> Waiver of a constitutional right must be both "knowing" and "voluntary." A defendant who deliberately fails to appear in court does so voluntarily, and thus the important question is whether his absence can be considered a "knowing" waiver. We hold that it can. The deliberate absence of a defendant who knows that he stands accused in a criminal case and that the trial will begin on a day certain indicates nothing less than an intention to obstruct the orderly

> processes of justice. No defendant has a unilateral right to set the time or circumstances under which he will be tried.

The *Tortora* Court did not hold that the district court should proceed *in absentia* in every case in which the defendant voluntarily absented himself, but that the decision of whether to proceed is "within the discretion of the trial judge, to be exercised only when the public interest outweighs that of the voluntarily absent defendant." *Id.* at 1210.

In *United States v. Sanchez*, 790 F.2d 245 (2d Cir.), *cert. denied*, 479 U.S. 989 (1986), the Second Circuit gave further guidance on the parameters of the district court's discretion to try a defendant *in absentia*. The *Sanchez* court wrote:

> [D]istrict judges must have broad discretion in determining whether to proceed with a trial *in absentia*. . . .
>
> In the present case, it is enough that, in a case with more than one defendant, Sanchez waived his right to be present by failing to appear without explanation and while on bail; that some reasonable steps, including a one-day continuation with notification to his attorney and the issuance of a bench warrant, were taken unsuccessfully in response to his non-appearance; that there was no reason to believe that the trial could likely soon be held with Sanchez present; and that severance would impose on the Government the burden of prosecuting two separate trials that would involve substantially the same evidence.

Id. at 251.

Read together, these cases provide the factors a district judge should consider when deciding whether to try a defendant *in absentia*. They include: the likelihood that the trial can take place with the defendant present, the difficulty of rescheduling, and the burden on the government and inconvenience to jurors of having to undertake two trials, particularly in a multiple defendant case. The district court carefully considered each of these factors before deciding to commence the trial without Crosby. It delayed the trial five days, trying to obtain Crosby's presence, before finally concluding that it would be unable to secure Crosby. Rescheduling of this case would have greatly disrupted the court's schedule and imposed a burden on the witnesses by requiring many of them to appear a second time.[3] Some of the witnesses were elderly with attendant problems of memory loss and the possibility that they might die before the trial could be rescheduled. In light of these conditions, holding two separate trials, one for three defendants and the other if and when Crosby was found, presented the court and jurors with significant inconvenience. Following the analysis suggested by the Second and Fourth Circuits, we have no difficulty satisfying ourselves that Crosby waived his right to be present at trial and that the district court acted within its discretion in trying Crosby *in absentia* together with the other three defendants who appeared at trial.

---

[3] The government had subpoenaed eighty-three witnesses, including witnesses from Virginia, rural Alabama, Wyoming, Iowa, Nebraska, North Dakota, Texas, New York, and Canada.

II.

Crosby also contends that the district court erred in failing to remove court-appointed counsel Douglas Altman as Crosby requested in a motion on Friday, October 7, just five days before the scheduled start of trial. We are satisfied that Judge Alsop did not abuse his discretion in denying this last-minute request to remove.

Crosby had attempted to discharge Altman in a motion twenty-nine days earlier, citing at that time a long list of issues on which Crosby and his counsel did not agree. At the previous hearing Altman also asked for permission to withdraw from the case. Magistrate Janis Symchych denied both requests, pointing out that Crosby was not entitled to select the individual attorney who would represent him when he was served by court-appointed counsel. *United States v. Crosby*, No. CR 3-88-40, slip op. at 1 (D. Minn. Sept. 23, 1988). Just as Crosby could not select his appointed counsel, he was also not at liberty to discharge that attorney. *Id.* Magistrate Symchych also concluded that the issues Crosby listed did not raise concern about ineffective assistance of counsel and that Altman could be prepared for trial by October 12. *Id.* at 1-2.

Shortly before trial, in a hearing before Judge Alsop, Crosby renewed his earlier motion to remove Altman. At that time, Altman again moved for permission to withdraw from the case. Judge Alsop heard the motions *in camera* and also denied both requests.

In *United States v. Hart*, 557 F.2d 162, 163 (8th Cir.), *cert. denied*, 434 U.S. 906 (1977), we held that a district court has broad discretion when determining whether

substitution of counsel is warranted. "The trial court, when confronted by such an allegation, has an obligation to inquire thoroughly into the factual basis of the defendant's dissatisfaction." *Id.* But, "[t]he right to effective assistance of counsel may not be improperly manipulated by an eleventh hour request to obstruct the orderly administration of justice." *Id.*

It is evident that there were disagreements between Crosby and his counsel. In denying Crosby's second motion to remove, Judge Alsop made a thorough investigation of the conflicts between Crosby and Altman, and made every reasonable effort to resolve them. Most of the difficulty seemed to be over Crosby's concern for obtaining financial documents he believed were necessary to his defense. In particular, there were two areas of concern. First, Crosby claimed that his attorney failed to use court-appointed accounting services to prepare financial summaries of documents stored in Crosb[illegible]rage.[4] Second, Crosby believed that financial records [illegible]red in a warehouse in California were also critical to his defense. He complained that Altman would not help him arrange to retrieve these records.[5]

---

[4] For at least six weeks before trial Crosby assured Altman that Crosby's father was organizing these records. This turned out to be untrue. Crosby did not inform Altman about the true state of these records until very close to trial. For this reason, Judge Alsop was less than sympathetic when Crosby attempted to lay blame on his attorney for failing to adequately prepare these records.

[5] Crosby contended that these California records were stored randomly throughout a warehouse along with furniture

(Continued on following page)

Judge Alsop made every effort to provide a remedy. He had already previously authorized funding for Crosby and his codefendants to employ a professional accountant in preparation for trial. The judge extended the scope of that funding so that Crosby could have the same accounting firm provide whatever additional services Crosby needed with respect to the disorganized financial records. In addition, he arranged for Crosby, if necessary, to personally fly to California to retrieve whatever records were stored there.[6] We are persuaded, as was Judge Alsop, that these two solutions resolved all significant conflicts between Crosby and Altman.

Crosby makes clear that he raises no claim of ineffective assistance of counsel, reserving this for later presentation. The record reveals that Crosby's counsel called numerous witnesses from all parts of the United States and vigorously presented a defense for Crosby. Crosby's counsel spent two days and questioned eight witnesses as part of Crosby's defense. The witnesses were from California, Canada, South Dakota, Texas and Virginia. The defense denied all allegations of fraud and attempted to show that Crosby was merely a poor administrator legitimately trying to establish a non-profit business. The

---

- (Continued from previous page)

and other papers, and that he was the only person who could identify the relevant items. A problem arose because the conditions of Crosby's bail did not permit him to leave Minnesota. Crosby complained that Altman did not do whatever was necessary to remove this travel restriction.

[6] The record does not reveal whether Crosby went to California.

accounting testimony, Crosby's primary bone of contention with respect to the removal of Altman as counsel, was not presented by any of the defendants' counsel. The government's case contains strong evidence against Crosby, including the fact that he received the major share of the proceeds of the fraudulent scheme and controlled the money, and substantial evidence of personal expenditures by Crosby, totaling some $260,000, while bills of the business went unpaid. While there were difficulties between Crosby and his lawyer, there is no evidence in the record of a breakdown in communication or that Altman was prevented from adequately presenting a defense. *See United States v. Wagner*, 834 F.2d 1474, 1482 (9th Cir. 1987); *Lowenfield v. Phelps*, 817 F.2d 285 (5th Cir. 1987), *aff'd in part*, 484 U.S. 231 (1988). The decision whether to remove counsel was completely within the district judge's discretion. We are satisfied that Judge Alsop did not abuse his discretion in this case by denying Crosby's request.

III.

Crosby also argues that he was prejudiced when counsel for defendant Cheatham questioned his brother Phillip Krzyzaniak, regarding whether Crosby knew when the trial was to begin and that he was supposed to be there. When Krzyzaniak took the stand, Cheatham's counsel indicated that he intended to examine Krzyzaniak on a number of issues, but the district court carefully limited the examination to Crosby's knowledge of the trial dates, the fact that he had planned to show up and that he did not. The district court ordered counsel not to examine the witness concerning the bond and who

put it up, but that only "flight" evidence was admissible. In his reply brief Crosby argues that admission of evidence of flight requires a showing of immediacy linking flight to the time of commission or accusation of the offense charged. Crosby claims that evidence probing his voluntary absence from trial does not qualify as flight evidence because it fails this immediacy requirement. He further claims that his absence from trial is irrelevant when determining his guilt or innocence since the absence was not related in time to either the time of the alleged offense or the time of accusation.

We are not convinced by the argument. As the Sixth Circuit explained in *United States v. Touchstone*, 726 F.2d 1116, 1119 (6th Cir. 1984):

> "[F]light" is generally admissible as evidence of guilt, and . . . juries are given the power to determine "how much weight should be given to such evidence." *United States v. Craig*, 522 F.2d 29, 32 (6th Cir. 1975), . . . [I]mmediacy "generally only becomes important in those cases where the defendant does not know, or his knowledge is doubtful, about the charges and accusations made against him." *United States v. Hernandez-Miranda*, 601 F.2d 1104, 1106 (9th Cir. 1979).

See also United States v. Peltier, 585 F.2d 314, 322-24 (8th Cir. 1978), *cert. denied*, 440 U.S. 945 (1979) (discussing the probative value of flight evidence in determining guilt or innocence). Because Crosby knew the charges against him and his scheduled trial date, there was no abuse of discretion in admitting this evidence.

IV.

Crosby's final argument is that the district court erred in conditioning probation on restitution of $550,000 to the victims of his fraud. He argues that the full $550,000 is not properly related to the offenses for which he was convicted. Crosby cites in his defense *United States v. Missouri Valley Construction Co.*, 741 F.2d 1542 (8th Cir. 1984) (en banc), in which this court stated:

> [W]here a defendant has been charged with crimes against several persons, but convicted on only some of the counts, the court may not order the defendant, as a condition of probation, to make payments to any persons who were not aggrieved by the precise acts charged in those counts on which conviction was had.

Id. at 1547. He argues that under *Missouri Valley*, the court can only sentence him to pay restitution to those forty-two victims who were expressly named in the indictment. Crosby's reading of *Missouri Valley* fails to recognize the true issue in that case. In *Missouri Valley*, the defendant corporation pled guilty to criminal conspiracy. In its sentence, the district judge imposed "as a condition of probation, in lieu of a fine, the requirement that [the corporation] contribute money to a charitable organization that [had] not suffered actual damages or loss from the corporation's criminal offense." *Missouri Valley*, 741 F.2d at 1544.[7] We vacated the sentence because it required

[7] The district judge imposed sentence pursuant to 18 U.S.C. § 3651 (1982 & Supp. II 1984) which was repealed, Act of Oct. 12, 1984, Title II, c. II, § 212(a)(2), 98 Stat. 1987, but which

(Continued on following page)

the defendant to pay restitution to someone other than a party "who suffered losses 'caused by the offense for which the conviction was had.'" *Id.* at 1547.

While *Missouri Valley* is not helpful to us, three days after the case before us was argued, the United States Supreme Court held in *Hughey v. United States*, 109 L. Ed. 2d 408 (1990), that a restitution order under 18 U.S.C. § 3579(a)(1) (1982) is limited to losses caused by the conduct underlying the offense of conviction.

Judge Alsop in his restitution order stated that the total loss for the twenty-five counts for which Crosby was convicted was $291,303. Should the court be without authority to order restitution in the amount of $550,000 for the 412 victims, we believe that under the principles of *Hughey* the $291,303 restitution figure is undoubtedly

---

(Continued from previous page)

still applies to offenses committed prior to November 1, 1986. The relevant portion of § 3651 states:

> The court may revoke or modify any condition of probation, or may change the period of probation.
>
> . . . .
>
> While on probation and among the conditions thereof, the defendant –
>
> > May be required to pay a fine in one or several sums; and
> >
> > May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had . . . .

sustainable. We are satisfied, however, that the appropriate course is to remand the case to the district court for further consideration of its restitution order in light in *Hughey*. This panel will retain jurisdiction of this appeal. If either party is aggrieved after the entry of the district court's order reconsidering the restitution award in light of *Hughey*, we will give further consideration to this issue on an expedited basis.

AMENDED

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

(Caption Omitted In Printing)

Order Denying Petition
For Rehearing and Suggestion
For Rehearing En Banc

Suggestion for rehearing en banc, filed by the appellant, has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Chief Judge Lay, Judge McMillian and Judge Arnold voted to grant the petition for rehearing en banc.

Petition for rehearing by the panel is also denied.

May 8, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gins

Clerk, U.S. Court of Appeals, Eighth Circuit.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

(Caption Omitted In Printing)

Appeal from the United States
District Court for the
District of Minnesota

JUDGMENT NUNC PRO TUNC

The judgment of the district court is affirmed. This judgment is entered nunc pro tunc to January 24, 1991, the date appellant notified this court of his agreement with the district court's amended judgment and commitment order entered after this court's opinion of limited remand.

Appellant filed a petition for rehearing on other issues, which was denied May 8, 1991. The filing of a petition for rehearing presupposes the existence of a final panel decision and the entry of judgment of this court as required by Rule 36 of the Federal Rules of Appellate Procedure. The record is hereby corrected to show entry of judgment.

September 30, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gins

Clerk, U.S. Court of Appeals, Eighth Circuit.

Supreme Court of the United States

No. 91-6194

Michael Crosby,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court Court [sic] of Appeals for the Eighth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 2, 1992